California GHG Waiver

Arguments Against Granting

Caveat

- After review of the docket and precedent, we believe the arguments against granting the waiver have high to very high legal vulnerability
  - All of the arguments discussed here would more likely than not lose in court if they are challenged
- The arguments here are presented in decreasing order of defensibility

Partial Grant

- Two possible approaches for granting a waiver only for later years
- Deny for first 2-3 years based on leadtime concerns
  - Plusses: 1) Plausible argument that manufacturers were counting on EPA's stated view that section 202 did not allow EPA regulation of GHGs and therefore EPA could not grant a waiver - thus, they were only on notice since April Supreme Court decision; 2) we routinely give manufacturers more than 9 months leadtime to meet our new standards
  - Minuses: 1) Evidence in docket indicates manufacturers can meet the standards for first 2-3 years; 2) EPA's long time view is that leadtime should run from date California enacts standards; 3) even given EPA's previous opinion regarding section 202, manufacturers were arguably not justified in thinking we would deny the waiver, given traditional analysis under section 209(b)(1)(C)

Partial Grant (cont)

- Grant the waiver conditioned on our finding that GHGs endanger public health or welfare
  - Plusses: 1) ties decision to a specific requirement in 202(a); 2) waiver will be automatic if we find endangerment
  - Minuses: 1) appears inconsistent with 209(b) burden of proof – we can't deny waiver unless we find inconsistency with 202(a) – EPA's failure to decide endangerment question seems a weak basis to affirmatively deny; 2) we will likely be attacked by waiver advocates for essentially denying CA's ability to act because we haven't made a decision that arguably we should have made already, and that we may be proposing to make in the same time frame; 3) goes against precedent that Congress intended CA to be trailblazer; 4) goes beyond the traditional test of consistency with 202(a) (i.e. tech feasibility in the leadtime provided)

Denial Finding: CA Doesn't Need GHG Standards to Meet Compelling and Extraordinary Conditions (1)

- Argument: Climate change is worldwide condition caused by worldwide pollution. CA conditions (causes of air pollution such as emissions/geography; levels of air pollution; effects of air pollution) are generally not extraordinary with respect to climate. Even with regard to ozone, change in climate caused by standards is so miniscule as to not have any discernible effect on ozone – thus, CA does not need these standards to meet any compelling & extraordinary conditions

CA Doesn't Need GHG Standards to Meet Compelling and Extraordinary Conditions (2)

- Plusses: 1) interpretation treating general climate issues different from other air pollution issues is plausible; 2) CA did not try to calculate specific reductions in temperature, which are very small
- Minuses: 1) Climate change directionally exacerbates CA ozone problems, which are the foundation of section 209(b); 2) data indicates standards will lead to reduction in temperatures (actually calculated by Alliance) and also reduction in ozone precursors; 3) EPA and courts have made clear that we are not to second-guess CA policy choices and that every little bit of reduction helps – Supreme Court opinion echoes this; 4) EPA will likely make arguments similar to CA to justify our own GHG rule; 5) inconsistent with precedent saying we look at vehicle program as a whole, not individual standards

Consistency With 202(a)

- Aside from arguments above, no defensible argument for denial.
- Auto manufacturers did not provide evidence that standards were infeasible.
- CA provided substantial evidence that standards could be met with technology already in field without reducing vehicle size.

Protectiveness finding

- We can only deny waiver under section 209(b)(1)(A) if we find CA was arbitrary and capricious in making its "in the aggregate" protectiveness finding
- Manufacturers rely on Sierra Research study to show that CA standards will increase ozone precursors
  - EPA has found several significant problems with the assumptions in the Sierra Research study
  - CA has provided its own study that indicates that the standards will decrease ozone precursors
  - OAR believes CA's assumptions are reasonable in general, and not arbitrary or capricious
  - EPA will be relying on assumptions similar to CA's in its GHG rule
- OAR does not believe that we can find CA's protectiveness finding to be arbitrary and capricious

EPCA Preemption

- DOT has determined that state GHG/CO2 standards are preempted under EPCA
- Case law indicates EPA can only deny waiver based on three criteria in section 209(b), not on separate statutory preemption (Constitutional preemption not as clear) – proper place for EPCA challenge is federal court
- We could caveat our decision (if we grant in whole or in part) by stating that the decision to grant a waiver only addresses CAA preemption
  - This is consistent with Cal. Court case – we defer to DOT's reasoned opinion that CO2 standards are preempted under EPCA
- Another approach is to defer deciding the waiver petition until the court's have decided the EPCA preemption issue.
  - This appears to conflict with Administrator's statements
  - This would likely not avert an "unreasonable delay" law suit